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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

The Commission should reject claims by some localities that Sections 253 and 332(c)(7) do not apply to decisions regarding access to state- and city-owned light, traffic, and utility poles.[1] Verizon previously submitted Comments and Reply Comments in this proceeding to explain that Sections 253 and 332(c)(7) apply fully to local siting decisions regarding these poles.[2] Verizon writes now to provide further support for this position.

Some parties claim that Sections 253 and 332(c)(7) do not apply to a locality's decisions, including fee decisions, regarding access to government-owned light, traffic, and utility poles because the locality is acting in its proprietary, rather than regulatory, capacity.[3] Those claims

[1] 47 U.S.C. §§ 253, 332(c)(7).

[2] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017) ("Notice") , at ¶ 96; Comments of Verizon at 25-29, WT Docket 17-79 and WC Docket 17-84 (June 15, 2017); Reply Comments of Verizon at 16-21, WT Docket 17-79 and WC Docket 17-84 (July 17, 2017).

[3] *See, e.g.,* Letter from Gerard Lederer, counsel to Smart Communities and Special Districts Coalition, to Marlene H. Dortch, FCC, WT Docket No. 17-79, at 5 (filed July 16, 2018) (contending that "a municipality exercises it proprietary authority as a landlord," rather than its regulatory powers, when it permits entities to use publicly owned structures such as street lights, street furniture, poles and traffic signals).

are misguided for two reasons. First, neither Section 253 nor Section 332(c)(7) distinguishes between states and localities acting in their proprietary versus regulatory capacities.[4] Congress was well aware that state and local governments act in both capacities when Sections 253 and 332(c)(7) were passed, but it did not create any exception in the statutes for governments acting in their proprietary capacities.[5] This implies that Congress intended for the Act to apply to actions taken by state and local governments, even where they operate in a proprietary capacity.[6] At minimum, Congress did not unambiguously indicate that the Communications Act applies only to state and local governments acting in their regulatory capacity, and the Commission should reasonably interpret Sections 253 and 332(c)(7) as applying to state and local governments regardless of whether they act in a proprietary or regulatory capacity.[7]

Second, even if the Commission determines that Sections 253 and 332(c)(7) apply only to state and local governments acting in their regulatory capacity, it should make clear that states and localities act in a regulatory capacity – and Sections 253 and 332(c)(7) apply – when they make siting decisions regarding their utility, light, and traffic poles. To the extent that preemptive federal statutes like the Communications Act do not apply to government action, courts have made clear that can be the case only where "a State acts as a 'market participant with

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[4] Generally speaking, governments act in a regulatory capacity when they perform functions that are sovereign or governmental in nature, while they act in a proprietary capacity when they interact with other entities as a private party would. *See, e.g.*, *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 70 (2008) (distinguishing between situations in which the government acts as a "regulator" and those in which it acts as a "market participant with no interest in setting policy" (internal quotation marks omitted)). For example, a locality acts in a regulatory capacity when it enacts and enforces rules requirements for employment contracts signed within its limits, while it may act in a proprietary capacity when it enters into employment contracts with its own employees.

[5] *See, e.g., In re Continental Airlines*, Memorandum Opinion and Order, 21 FCC Rcd 13201, 13214 at ¶ 32 (2006) ("The OTARD rules have no express exception for governmental entities, and we find no reason to withhold application of the OTARD rules, as a general matter, to state and local government entities that are acting in a proprietary capacity as landlords.").

[6] *See Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 231-32 (1993) (where Congress provides an "implied indication … that a State may not manage its own property when it pursues its purely proprietary interests," such a restriction is proper).

[7] For similar reasons, the Commission's previous determination that Section 6409 of the Spectrum Act does not apply to state and local actions on siting applications when the local governments act in their proprietary, as opposed to regulatory, capacity is incorrect. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6409(a), 126 Stat. 156 (2012) (codified at 47 U.S.C. § 1455(a)) ("Section 6409"); *In the Matter of Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies,* Report and Order, 29 FCC Rcd. 12865, 12964-65 at ¶¶ 239-40 (2014), erratum, 30 FCC Rcd 31 (2015), *aff'd, Montgomery Cnty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

no interest in setting policy.'"[8] Applying this principle to the Communications Act, courts inquire whether a state or municipality's "interactions with the market [are] so narrowly focused, and so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out."[9] The Second Circuit applied this principle to establish the following test for whether a municipality engages in a predominantly proprietary manner under the Communications Act: "(1) whether 'the challenged action essentially reflect[s] the entity's own interest in its efficient procurement of needed goods and services, as measured by comparison with the typical behavior of private parties in similar circumstances,' and (2) whether 'the narrow scope of the challenged action defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem.'"[10]

Public rights-of-way, which are held and managed by state or local governments for the public good, are held in a regulatory capacity under this test.[11] The Commission previously explained that "municipalities generally do not have a compensable 'ownership' interest in public rights-of-way, but rather hold the public streets and sidewalks in trust for the public,"[12] which is consistent with the determination adopted widely by courts that "the ownership interest municipalities hold in their streets is 'governmental,' and not 'proprietary.'"[13] The light poles, traffic lights, and utility poles that are within these rights-of-way are held by governments in their regulatory capacity for the same reason that the rights-of-way themselves are: they are held for public purposes, such as public safety and the provision of public services. Just as governments possess and control the streets to ensure the public good and not to "address a

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[8] *Brown*, 554 U.S. at 70 (quoting *Associated Builders*, 507 U.S. at 229).

[9] *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 420 (2d Cir. 2002) (quoting *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999)) (internal quotation marks omitted).

[10] *Id*. (alteration in original) (quoting *Cardinal Towing*, 180 F.3d at 693).

[11] *See* Comments of Verizon at 26-28, WT Docket 17-79 and WC Docket 17-84; Reply Comments of Verizon at 18-19, WT Docket 17-79 and WC Docket 17-84.

[12] *See In the Matter of Implementation of Section 621(A)(1) of the Cable Commc'ns Policy Act of 1984 as Amended by the Cable Television Consumer Prot. and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5160 at ¶ 134 (2007) ("*Cable Franchising Report and Order*"), *petition for review denied*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[13] *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 221-22 (1st Cir. 2005) (citing *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 761 (Colo. 2001) (en banc)); *see also American Tel. & Tel. Co. v. Village of Arlington Heights*, 620 N.E.2d 1040, 1044 (Ill. 1993); *City of N.Y. v. Bee Line, Inc.*, 284 N.Y.S. 452, 456 (App. Div. 1935), *aff'd*, 3 N.E.2d 202 (N.Y. 1936)); *City of Zanesville v. Zanesville Tel. & Tel. Co.*, 59 N.E. 781, 785 (Ohio 1901); *Hodges v. Western Union Tel. Co.*, 18 So. 84, 85 (Miss. 1895).

specific proprietary policy," so too they possess and control the traffic lights, light poles, and utility poles within those rights-of-way in their regulatory capacity.[14]

Even if the Commission were to evaluate government-owned poles within the rights-of-way independently of the rights-of-way themselves, it should find that cities act within their regulatory capacity when they make decisions regarding the siting of wireless facilities on municipal poles. This is true because both prongs of the *Mills* test outlined above make clear that governments manage their poles and the wireless siting decisions regarding them in their role as regulators. At minimum, municipalities' actions with regard to the poles they own are not "so in keeping with the ordinary behavior of private parties, that a regulatory impulse can be safely ruled out," as is required to find that a municipality acts in a proprietary capacity.[15]

First, in making wireless siting decisions regarding the poles they own, state and local governments do not act like "private parties [would] in similar circumstances" to "procure[] … needed goods and services."[16] There is no private party that provides the same good – access to light poles, traffic lights, and utility poles – in "similar circumstances."[17] Governments face no meaningful competition for placement of wireless facilities on their poles, because no private party is similarly situated in owning dozens, hundreds, or thousands of poles throughout an individual city. At its core, the regulatory/proprietary distinction is a question of whether a governmental entity "is more powerful than private parties," or is merely another "market participant."[18] Because a state or local government is often the only entity that controls large numbers of poles within its confines, it is substantially more powerful than any private parties.[19] It thus occupies a distinctive position that sets it apart from private parties and cannot fairly be

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[14] *See In the Matter of Petition of the State of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd 21697, 21707-08 at ¶ 19 (1999) (noting that preemption under Section 253 was appropriate because "Minnesota is not merely acquiring fiber optic capacity for its own use," but also for use by the State's residents).

[15] *Mills*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693).

[16] *Id.*

[17] In some cases, private utilities own utility poles and may lease them to third parties. But it is unlikely that private utilities will own utility poles in the same jurisdiction where the local government owns utility poles. This is because, for example, if a local government owned entity provides electric power in the jurisdiction, it is unlikely a private electric utility will have poles in the area. Even where privately-owned utility poles and government-owned utility poles co-exist, privately-owned poles are not similarly situated to government-owned poles because public and private entities have different interests in owning such poles. Governments own poles for the public good, while private entities own poles solely for financial gain.

[18] *Associated Builders*, 507 U.S. at 229.

[19] Telephone companies and electric utilities must charge regulated rates for attachments to their poles. *See* 47 U.S.C. § 224.

analogized to merely another market participant. Courts of appeals have recognized this very distinction. In *Selevan v. New York Thruway Authority*, for example, the Second Circuit rejected a claim that a highway authority was acting in a proprietary capacity "in the local highway transportation market" when it set its toll rates, because there was "no evidence in the record that [the highway authority] competes with other entities that are also seeking to build and maintain highway systems."[20]

State and local governments also do not construct and own these poles to advance their own economic agendas; they instead do so to enhance public safety and the public interest. Government entities would build and operate street lights, traffic lights, and utility poles – in their regulatory capacity to support the public good – even if they could not lease space on them to a third party for pecuniary gain. Indeed, for decades, governments have built and operated these poles, even absent the ability to charge rent for pole attachments. State and local governments' interest in those poles do not suddenly transform from a regulatory to a proprietary one simply because cities now have the opportunity to lease access to them. Their actions with regard to these poles, which are within their control solely because the localities are governmental entities, thus cannot by their very nature be "in keeping with the ordinary behavior of private parties" in "similar circumstances,"[21] for there are no similarly situated private parties.[22] Governments can grant access to the good at issue – their networks of poles – only by virtue of their status as regulators, and as a result they necessarily operate in their regulatory capacity in managing access to these poles.

Second, in managing access to the poles they own, governments do not act with such "narrow scope" that adjudication of siting applications "defeat[s] an inference that its primary goal was to encourage a general policy rather than address a specific proprietary problem."[23] States and localities negotiating access to light poles, streetlights, and utility poles with wireless providers generally act not on a case-by-case basis, but instead pursuant to master lease or license agreements and local zoning ordinances.[24] These master agreements, in which localities provide for access to the poles they own by the hundreds or thousands, leave little doubt that state and local governments are engaging in broad-based regulation of access to poles for wireless companies, as opposed to the kind of individualized leasing transactions that a private party would undertake.

Case law confirms this common sense distinction. A court in the Southern District of New York explained that where a city "implement[s] a general franchising scheme," the city's

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[20] *Selevan v. New York Thruway Authority*, 584 F.3d 82, 93 (2d Cir. 2009).

[21] *Mills*, 283 F.3d at 420 (quoting *Cardinal Towing*, 180 F.3d at 693).

[22] *See* note 17, *supra.*

[23] *Id.*

[24] *See* Comments of Verizon at 7-8, 18-19, WT Docket No. 16-421 (Mar. 8, 2017) ("Verizon Small Facility Comments") (noting Verizon's experience that negotiating with local governments generally involves master lease agreements and zoning ordinances).

"actions … are not of a purely proprietary nature, but rather, were taken pursuant to regulatory objectives or policy."[25] Thus, where a city made siting decisions that aimed to "support the availability of robust, reliable, high-quality mobile services while also protecting the public interest in a streetscape that is safe, not excessively cluttered in appearance, and otherwise consistent with City use of the relevant facilities and their surroundings," those decisions were regulatory in nature.[26] As the court explained, the city's franchising scheme could not "readily be described as 'narrow' or as 'address[ing] a specific proprietary problem' where access to three thousand City lightpoles is at issue."[27] When states and localities negotiate access to their poles with Verizon, they typically negotiate agreements that establish the terms of access to hundreds or thousands of poles, confirming the *NextG Networks* court's determination that the city was not dealing in narrow terms, but instead on a broad scale to effect its chosen policy.[28]

State and local governments themselves confirm as much. They contend that the Commission should not limit local authority over wireless siting decisions precisely because state and local governments need to balance the benefits of providing wireless technology with the impact of the placement of wireless facilities on aesthetics and other municipal interests. Indeed, unlike private parties, in negotiating access to poles they own, state and local governments maintain a strong "interest in setting policy," a hallmark of a "regulator."[29] The effort to balance public benefits and public harms that governments undertake is precisely the

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[25] *NextG Networks of New York, Inc. v. City of New York*, No. 03 CIV. 9672 (RMB), 2004 WL 2884308, at *5 (S.D.N.Y. Dec. 10, 2004).

[26] *Id.* (internal quotation marks omitted).

[27] *Id.* n.9.

[28] This distinction between individualized decisions regarding the leasing of space on traditional government property such as municipal buildings and broad-based decisions regarding access to government owned poles explains how courts have analyzed the proprietary/regulatory distinction. *Compare Mills*, 283 F.3d at 420 (finding that a city entity acted in a proprietary capacity when it "entered into a single lease agreement with respect to a single building," and in which the city did not have any broader guidelines respecting the lease at issue), *and Superior Commc'ns v. City of Riverview, Michigan*, 881 F.3d 432, 445 (6th Cir. 2018) (finding that a city acted in a proprietary capacity in enforcing the terms of a single lease on a city owned cellular tower built on city property), *and Omnipoint Commc'ns, Inc. v. City of Huntington Beach*, 738 F.3d 192, 201 (9th Cir. 2013) (finding that a city acted in a proprietary capacity when it determined that it could not license the use of a city-owned park to a provider to build a cellular tower), *with NextG Networks*, 2004 WL 2884308, at *5 & n.9 (finding that a city acted in its regulatory capacity when it negotiated access to 3000 poles in order to promote the public interest and pursuant to a franchise agreement), *and Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 325 (2d Cir. 2000) (finding a zoning restriction on the use of radiofrequency radiation, which was applied to several operators of radiofrequency, was preempted by Section 253).

[29] *Brown*, 554 U.S. at 70.

kind of regulatory function that governmental entities acting as regulators perform, and those acting as market participants do not.[30]

For these reasons, the Commission should find that states and localities act in a regulatory capacity when they make decisions regarding the placement of wireless facilities on city-owned poles, triggering the application of Sections 253 and 332(c)(7) to their actions.

Sincerely,

cc: (via e-mail)

Donald Stockdale
Suzanne Tetreault
Garnet Hanly

[30] *Cf. New England Health Care Employees Union, Dist. 1199, SEIU/AFL-CIO v. Rowland,* 204 F.Supp.2d 336, 344-45 (D.Conn.2002) ("unlike the 'purely proprietary' interests of the defendants in [*Associated Builders*], the defendants in this case ... acted within a regulatory scheme that focused on insuring the health and safety of the public, not on regulating the bargaining relationship between labor and management").